

**STATE OF MICHIGAN
IN THE SUPREME COURT**

JULIE A. PUCCI,

Plaintiff-Appellant,

vs.

CHIEF JUDGE MARK W. SOMERS,
in his individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee

Supreme Court No. 153893

Court of Appeals No. 325052

Wayne County Circuit Court
Case No. 13-014644-CZ

THE CITY OF DEARBORN'S AMICUS CURIAE BRIEF

Miller, Canfield, Paddock and Stone, PLC
Paul D. Hudson (P69844)
277 South Rose Street, Suite 5000
Kalamazoo, MI 49009
Attorneys for Amicus Curiae
City of Dearborn

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STATEMENT OF QUESTIONS PRESENTED

Amicus curiae the City of Dearborn adopts the statement of questions presented in garnishee-appellee Nineteenth District Court's brief on appeal.

INTRODUCTION

No chief judge of a district court can unilaterally impose million-dollar liabilities on a city and its taxpayers. Yet that is Plaintiff's position here. Plaintiff is attempting to collect a \$1.1 million judgment from the Nineteenth District Court—and therefore from the court's funding unit, the City of Dearborn and its taxpayers—even though the underlying judgment was entered against former chief judge Mark Somers in his *individual capacity* only, and not in any official capacity, even though the district court was dismissed from the underlying suit because it was *immune* from Plaintiff's claims, and even though the City of Dearborn was dismissed from the suit because it had nothing to do with the termination decision that led to the judgment against Somers. Plaintiff's only justification for seeking this exceptional relief is a purported "indemnification policy" that Judge Somers conjured right before the axe was about to fall in the lawsuit against him. Plaintiff argues that this indemnification policy palmed off Somers' liability on the district court and the City through the backdoor, even though they had already been absolved of any actual liability in the suit.

The "indemnification policy" is unenforceable under bedrock Michigan law. Under basic separation-of-powers principles, no district court judge has the power to foist million-dollar liabilities on other branches of the government—like the City of Dearborn here—without approval and consent or without going through this Court's well-established channels for compelling funding. As this Court has made clear, this is because "the allocation of resources through the appropriations and taxing authorities lies at the heart of the *legislative* power, and thus belongs to the legislative branch," not the judicial branch. *46th Circuit Trial Court v Crawford County*, 476 Mich 131; 719 NW2d 553 (2006). The only exceptions are in the "rare instances in which the legislature's allocation of resources impacts the ability of the judicial

branch to carry out its constitutional responsibilities,” and even then the courts’ power is “sharply circumscribed” and the courts must follow a carefully delineated procedure in which they file litigation to compel funding from the other branch and then “prove by clear and convincing evidence that the requested funding is both ‘reasonable and necessary’” to carrying out their constitutional judicial functions. *Id.* at 149. None of that happened here, and suffice it to say that paying Judge Somers’ personal legal tab could not possibly meet these demanding standards even if the proper procedures had been followed.

Plaintiff argues that a court rule—the “Chief Judge Rule” of MCR 8.110—cloaked Judge Somers with the authority to act on behalf of the district court and thereby impose the million-dollar liability on it and the City through the indemnification policy. But this argument likewise fundamentally misunderstands the nature of judicial power. Court rules cannot impose million-dollar liabilities. The court rules were passed pursuant to a constitutional grant of authority to pass rules of “*procedure*.” As this Court has made clear, this power over procedure is limited to procedure alone, and cannot veer into areas of substantive law, which is the domain of the legislature. *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). Thus no court rule could possibly have the effect that Plaintiff argues the Chief Judge Rule has here.

In the end, Judge Somers’ “indemnification policy” is an obvious sham on its face. And *even if* the policy had been instituted in good faith, it would *still* be unenforceable as a matter of basic separation-of-powers principles and this Court’s controlling decision in *Crawford*. Under our Constitution, no district court judge has the power to compel appropriations—much less million-dollar appropriations to fund a personal expense—without either approval from the court’s funding unit or filing a lawsuit to compel funding that complies with all of *Crawford*’s rigorous procedural requirements. Neither happened here, and thus the “indemnification policy”

is a legal nullity and unenforceable. The City of Dearborn, as amicus curiae, respectfully requests that this Court affirm the Court of Appeals' decision.

STATEMENT OF INTEREST OF AMICUS CURIAE

In its order granting leave to appeal, the Court invited the City of Dearborn to file an amicus curiae brief in this appeal. The City of Dearborn was previously a party in the federal litigation in this case, but was dismissed by stipulation and order because it played no role in the termination decision at issue there. But the City is also the funding unit of the 19th Judicial District Court, and thus the City has a direct interest in the plaintiff's attempt to collect from the District Court a \$1.1 million judgment owed by Judge Somers individually. It would be the City ultimately left paying the tab if the plaintiff's unprecedented theory of recovery here were recognized.

More fundamentally, the City of Dearborn's interest in this case is as a representative of all funding units in the state. As discussed in detail below, under basic separation of powers principles, courts do not have authority to compel million-dollar appropriations from their funding units without approval and consent or without complying with the demanding standards set forth by this Court in *Crawford* to compel that funding. The City of Dearborn and all court funding units in this State have a strong interest in ensuring that these fundamental constitutional limits are respected in this case and all other cases.

STATEMENT OF FACTS

The City of Dearborn adopts the statement of facts set forth in Appellee's brief on appeal. After Appellee's brief was filed, Judge Somers filed an amicus brief. The City will not discuss at length the factual and legal errors and misrepresentations in Judge Somers' submission, but notes the following: (1) Somers' discussion of the settlement discussions in the federal case is

both wholly inappropriate, since these were confidential settlement discussions protected under the Open Meetings Act, and factually inaccurate, since it was Judge Somers *himself* who adamantly refused to settle the case for the relatively small amounts he recounts in his brief, and only later sought to settle when he was the sole defendant in the case and the settlement demand approached a million dollars; (2) the City of Dearborn cases Somers cites involved the City or the 19th District Court as defendants, not a jury verdict against a single defendant in his individual capacity; (3) Somers' argument that his wrongdoing was actually in his official capacity is directly contradicted by the federal court record, where he exhausted all available appeals on that issue; (4) Somers himself discontinued or failed to procure judicial insurance when he was Chief Judge, then it was re-instituted after this case; and (5) punitive damages cannot be assessed against a City, *see City of Newport v Fact Concerts, Inc*, 453 US 247, 271; 101 S Ct 2748, 2762 (1981) ("a municipality is immune from punitive damages under 42 U.S.C. § 1983").

STANDARD OF REVIEW

The City of Dearborn adopts the standard of review set forth in Appellee's brief on appeal.

ARGUMENT

I. The "Indemnification Policy" Is Unenforceable Because It Impermissibly Purports to Compel Appropriations from Another Branch of Government, in Violation of Separation of Powers Principles and this Court's Controlling Decision in *Crawford*.

Under basic separation-of-powers principles, courts do not have authority to unilaterally foist million-dollar liabilities on other branches of government. Yet that is what the supposed "indemnification policy" purported to do here. As the 19th District Court correctly notes in its brief on appeal, "[b]y its very nature . . . an indemnification policy is a decision to appropriate funds: it requires a court [and thus its funding unit and the taxpayers] to pay the financial

obligation of another party for which it otherwise bears no legal responsibility.” (Appellee’s Br at 12.) As the 19th District Court further correctly notes, this “indemnification policy” was never submitted to the court’s funding unit—the City of Dearborn—through a budget request or otherwise. See MCL 600.8271(1) (“the chief judge of the judicial district shall submit to the governing body of the district funding unit a budget request in line-item form with appropriate detail”). Indeed, it is undisputed that the City of Dearborn would have rejected this “indemnification policy” had it been properly submitted.

Thus the question here is whether Judge Somers was cloaked with the authority to impose this million-dollar liability on the City of Dearborn’s taxpayers *unilaterally*, without *any* approval from the funding unit of the court. Specifically, the question is whether the indemnification policy—which purports to compel a \$1.1 million appropriation from the City of Dearborn just in this case alone, in addition to any other current or future liabilities that would be covered by the policy—was a valid and enforceable exercise of judicial power, or rather an unenforceable and unconstitutional infringement of the legislative power.

- A. **Under this Court’s decision in *Crawford*, a court does not have authority to compel appropriations from another branch of government except in rare circumstances where the funding is necessary to carry out essential judicial functions. Even then, the court has to file a lawsuit and meet the rigorous standards set forth in *Crawford*.**

This Court discussed these principles in detail in *46th Circuit Trial Court v Crawford County*, 476 Mich 131; 719 NW2d 553 (2006). In *Crawford*, a circuit court brought suit to compel its funding units—several defendant counties—to appropriate funding for enhanced pension and retiree healthcare plans for court staff. *Id.* The court there, in other words, had done things right procedurally: it didn’t just adopt the enhanced plans unilaterally and then let the pensioners come after the court and the funding units for payment. First the court asked for approval from the funding units, and then, after the request was rejected, the court filed a suit to compel payment, arguing that the enhanced retiree plans were prudent and necessary and worth the cost that would be imposed on the funding units. *Id.*

The *Crawford* Court was thus faced with a “conflict between the legislative branch’s exercise of the ‘legislative power’ to appropriate and to tax, and the judicial branch’s inherent power to compel sufficient appropriations to carry out its essential judicial functions.” *Id.* at 134. To resolve this conflict, the Court started with first principles. The Michigan Constitution separates governmental powers between the legislative, executive, and judicial branches (Const. 1963, arts 4-6), and expressly provides that “[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const. 1963 art. 3 § 2. Thus legislative powers belong to the legislature alone; the judiciary is not permitted to legislate. And “[p]erhaps the most fundamental aspect of the ‘legislative power’ . . . is the power to tax and to appropriate for specified purposes.” *Crawford*, 476 Mich at 141. This is because “[t]he power to tax defines the extent to which economic resources will be apportioned between the people and their government, while the power to

appropriate defines the priorities of government.” *Id.* “Partly in recognition of the enormity of these powers, the framers of our constitutions determined that the branch of government to exercise these powers should be that branch which is closest to, and most representative of, the people.” *Id.* at 141-42. Moreover, “[i]n contrast with the judiciary . . . the legislature is not restricted in the range of testimony that it may hear as a prelude to enacting public policy, it is better positioned to accommodate competing policy priorities, it is better equipped to effect compromise after negotiation and bargaining, it is more regularly and directly accountable to the people and its membership is more broadly representative of society and its various interests.” *Id.* at 142.

The Court recognized, however, that the judicial branch must have some “inherent power” to compel funding to ensure it has adequate resources to carry out its own constitutionally mandated functions. *Id.* at 141-42. “[I]n those rare instances in which the legislature’s allocation of resources impacts the ability of the judicial branch to carry out its constitutional responsibilities, what is otherwise exclusively a part of the legislative power becomes, to that extent, a part of the judicial power.” *Id.* at 142.

The Court in *Crawford* made clear, however, that this “inherent power” of the judiciary “has always been sharply circumscribed.” *Id.* at 143. “The ‘inherent power’ contemplates only the power, when an impasse has arisen between the legislative and judicial branches, to determine levels of appropriation that are ‘reasonable and necessary’ to enable the judiciary to carry out its constitutional responsibilities.” *Id.* “Thus, a lawsuit to compel funding under the ‘inherent powers’ doctrine is limited to circumstances where ‘the overall operation of the court, or a constitutional function is in jeopardy because of the actions taken by the funding unit.’” *Id.*

at 147 (quoting *Employees & Judge of the Second Judicial Dist Ct v Hillsdale Co*, 423 Mich 795, 717-19; 378 NW2d 744 (1985)).

Thus, the Court in *Crawford* set forth a detailed procedure that a court must follow if it wishes to impose a funding obligation on a funding unit.¹ First, the court must actually request the funding and thereafter reach an “impasse” with the legislative branch. *Id.* Then, “[i]n litigation to compel funding, the plaintiff court must prove by clear and convincing evidence that the requested funding is both ‘reasonable and necessary.’” *Id.* at 149. “The plaintiff court seeking to compel funding must demonstrate that the overall operation of the court, or a constitutional function is in jeopardy because of the actions taken by the funding unit.” *Id.* “Finally, a court deciding an inherent powers claim must specifically set forth findings of fact identifying specifically those judicial functions that will be in jeopardy if the appropriation sought is denied, and conclusions of law indicating why such functions implicate the constitutional responsibilities of the judiciary.” *Id.*

B. Judge Somers’ “indemnification policy” is unenforceable as a matter of law under *Crawford* because—even if the policy were not a sham on its face—neither Judge Somers nor the district court had the power to unilaterally compel appropriations from the City of Dearborn without complying with all of *Crawford*’s procedural requirements.

The 19th District Court is exactly right that Judge Somers’ “indemnification policy” is an obvious sham on its face. “If a judge can procure funding to insulate himself from personal liability for a \$1.1 million judgment via the adoption of an ‘indemnification policy,’ there is nothing to stop him from unilaterally requiring the Court to fund other personal expenses that he might otherwise wish to avoid,” like a “‘transportation policy’ requiring the Court to pay his

¹ Some of the procedures were set forth in a plurality opinion that was joined only in part by a concurring Justice. The requirements discussed here were joined by a majority of Justices of this Court.

monthly car payment to facilitate his commute to work,” or an “education policy” requiring the Court to pay off the student loans that he incurred to obtain the law degree on which his job depends.” (Appellee’s Br at 17-18.) With the stroke of his pen, the chief judge could make the court, and thereby the City of Dearborn and its taxpayers, his own personal piggy bank. It seems pretty clear, to the City of Dearborn at least, that this is precisely what Judge Somers attempted to pull off here.

But *even if* this “indemnification policy” were not an obvious sham, it would *still* be unenforceable under *Crawford*. In other words, even if this “indemnification policy” had been enacted in good faith and with the legitimate interests of the district court’s employees in mind, it would still fail as a matter of law because it was subjected to none of the rigorous procedures required by *Crawford*.

Indeed, even the very first step required by *Crawford* was never taken: The indemnification policy was not presented to the district court’s funding unit for review, approval, amendment, or discussion. There are some situations, for example, where some sort of indemnification policy would be appropriate, and thus the City may have determined that it was worth the expense to the City and its taxpayers to fund some sort of indemnification policy. Indeed, the Governmental Tort Liability Act (GTLA) provides that governmental agencies have discretion to indemnify employees for judgments awarded against the employees for acts taken in the course of employment and while acting within the scope of their authority. See MCL 691.1408(1). And a court might be able to make a compelling case to a funding unit that it would be wise to adopt and fund such a policy to protect employees from such judgments. But the point here is that this back-and-forth never took place, the “indemnification policy” was never even presented to the City for approval, and thus the parties never reached the “impasse”

that the *Crawford* Court referenced that would require judicial resolution. Indeed, there is no “impasse” here between the judicial and legislative branches: both the court (the 19th District Court) and the funding unit (the City of Dearborn) *agree* that the “indemnification policy” is a sham and is unenforceable.

Because Judge Somers never submitted the supposed “indemnification policy” to the City, he and the district court then also never filed “litigation to compel funding” from the City. *Crawford*, 476 Mich at 149. Thus the district court never “prov[ed] by clear and convincing evidence that the requested funding” to fund the indemnification policy was “both reasonable and necessary.” *Id.* Indeed, the 19th District Court’s position in this litigation is that the “indemnification policy” was the exact opposite: neither reasonable nor necessary but rather a sham and unenforceable, “an unbridled mandate by a self-interested judge requiring taxpayers to fund a personal expense that should not otherwise be borne by the public.” (Appellee’s Br at 2.)

The district court then never made the requisite showing that the “overall operation of the court, or a constitutional function [was] in jeopardy because of the actions by the funding unit” in (hypothetically) rejecting the indemnification policy. *Id.* Again, the 19th District Court’s position here is that *approval* of the “indemnification policy” would jeopardize the court’s functions, and the court *agrees* with the City of Dearborn that rejection of the sham policy is best for the court.

Finally, since none of this happened and none of these required *Crawford* showings were made, no reviewing court has “specifically set forth findings of fact identifying specifically those judicial functions that [would] be in jeopardy if the appropriation sought [were] denied,” or “conclusions of law indicating why such functions implicate the constitutional responsibilities of

the judiciary.” *Id.* Indeed, neither the court (the 19th District Court) nor the funding unit (the City of Dearborn) ask this Court to make any such findings or conclusions of law here.

In short, since Judge Somers purported to adopt this indemnification policy unilaterally and without either approval from the court’s funding unit or a reviewing court’s determination that the indemnification policy was reasonable and necessary, the purported “indemnification policy” is unenforceable as a matter of law. Under basic separation of powers principles and this Court’s controlling decision in *Crawford*, Judge Somers was not constitutionally permitted to unilaterally impose a million-dollar liability on another branch of government.

II. Plaintiff’s Reliance on a Court Rule as Authority for Judge Somers’ Unilateral Action Is Misplaced: Court Rules Are Rules of Procedure Only, and Cannot Possibly Create Substantive Million-Dollar Funding Obligations.

Plaintiff argues that a court rule, MCR 8.110, gave Judge Somers the power to bind the district court, and thereby the City of Dearborn, to the purported “indemnification policy.” (See Appellant’s Br at 8-9.) As a preliminary matter, the 19th District Court is once again absolutely correct in its brief on appeal that this argument fails under the plain language of the court rule, which does not give chief judges unbridled authority to bind their courts to any and all policies they dream up. (*See* Appellee’s Br at 10-11.)

But Plaintiff’s argument once again fails at an even more fundamental level as well. Even if the language of the court rule *had* purported to authorize chief judges to impose million-dollar indemnification obligations, the rule could not possibly be enforceable. This is because court rules can address matters of *procedure* only, and may not invade the Legislature’s prerogative to decide matters of *substance*. Thus the notion that a court rule could somehow foist a million-dollar-plus liability on another branch of government fundamentally misunderstands the nature and powers of a court rule.

The Court discussed the procedural limits of court rules in *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). The 1963 Constitution vested the Supreme Court with the authority to adopt rules of “practice and procedure.” Const 1963, art 6, § 5. Thus, “[i]t is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court.” *McDougall*, 461 Mich at 26. “Indeed, this Court’s primacy in such matters is established in our 1963 Constitution,” which expressly provides that “[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.” *Id.* (quoting Const 1963, art 6, § 5.) “This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles,” and the legislature may not “meddle or interfere” with areas committed to the Court’s rulemaking powers. *Id.* (quoting *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964)).

But the Court’s authority to adopt rules of procedure is limited to matters of procedure, not substance. “[T]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law.” *McDougall*, 461 Mich at 27. “Rather, as is evident from the plain language of art. 6, § 5, this Court’s constitutional rule-making authority extends *only* to matters of practice and procedure.” *Id.* Thus, court rules may address only “purely procedural matters,” and cannot infringe upon the legislature’s prerogative to enact changes to the “substantive law.” *Id.* To the extent a court rule infringes upon matters of substance, it would violate “the constitutionally required distinction between ‘practice and procedure’ and substantive law,” and thus would exceed “the reach of [the Court’s] rule-making authority.” *Id.* at 29.

Thus, no court rule could possibly do what Plaintiff argues that MCR 8.110 does here: authorize a chief judge to impose a million-dollar funding obligation on a Michigan city. This

would go well beyond a matter of procedure and right into the heart of the Legislature's domain of setting the substantive law.

CONCLUSION

The City of Dearborn respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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/s Paul D. Hudson
Miller, Canfield, Paddock and Stone, PLC
Paul D. Hudson (P69844)
277 South Rose Street, Suite 5000
Kalamazoo, MI 49007
hudson@millercanfield.com
Attorneys for Amicus Curiae
City of Dearborn

29663823.1\021733-00060